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TAN KAH FATT & ANOR v. TAN YING

FEDERAL COURT, PUTRAJAYA
ABDUL RAHMAN SEBLI CJ (SABAH & SARAWAK)
HASNAH MOHAMMED HASHIM FCJ
MARY LIM FCJ
B [CIVIL APPEAL NO: 02(f)-82-10-2019(B)]
18 JANUARY 2023

Abstract – *In interpreting s. 6 of the Distribution Act 1958, the purpose of the Act is to be given consideration; the Act provides for the distribution of the estate of the deceased among those who survived the deceased to follow the order of succession provided in s. 6. And the express use of the word 'issue' instead of 'child' in s. 6 of the Act, connotes that both the terms ought not to be treated the same. Read holistically, the term 'issue' sought to enlarge the category of persons who may inherit under the Act, regardless of legitimacy of the descendant.*

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SUCCESSION: *Administration of estates – Administrator – Application for removal of joint administrator – Whether in conflict of interest – Whether there was sufficient cause to revoke letters of administration – Whether lower court sufficiently weighed grounds of complaint against welfare and interest of beneficiaries – Probate and Administration Act 1959, s. 34*

E

SUCCESSION: *Distribution of estate – Intestacy – Child of void marriage – Chinese customary marriage not solemnised in accordance with requirements under Law Reform (Marriage and Divorce) Act 1976 – Whether child of void marriage should be treated as legitimate child – Whether Distribution Act 1958 provides law for distribution of intestate estate regardless of legitimacy of child or validity of marriage – Whether use of term 'issue' instead of 'child' suggested descendants by blood lineage – Whether intended to expand category of persons who may succeed or inherit – Whether child of void marriage entitled to inherit under late father's estate – Distribution Act 1958, ss. 3 & 6*

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STATUTORY INTERPRETATION: *Construction of statutes – Purposive approach – Distribution Act 1958, s. 6 – Whether Distribution Act 1958 provides law for distribution of intestate estate regardless of legitimacy of child or validity of marriage – Whether use of term 'issue' instead of 'child' suggested descendants by blood lineage – Whether intended to expand category of persons who may inherit*

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WORDS & PHRASES: *'issue' – Distribution Act 1958, s. 6 – Whether use of term 'issue' instead of 'child' suggested descendants by blood lineage – Whether intended to expand category of persons who may succeed or inherit*

I

Tan Kah Yong ('deceased'), who died intestate, left behind a wife, Tan Ying and a daughter, Tan Sin Lin. He also left behind another daughter named Tan Sin Yee ('second appellant') who was born earlier from his relationship with Lu YanLiu. Both Tan Ying and Lu YanLiu were Chinese nationals. The deceased was also survived by his parents and his younger brother, Tan Kah Fatt ('first appellant'). The marriage between the deceased and Tan Ying was registered under the Law Reform (Marriage and Divorce) Act 1976 ('LRA') while the deceased and Lu YanLiu only underwent a Chinese customary marriage. The existence of this customary marriage was under challenge. The first appellant together with Tan Ying applied for and were granted the letters of administration to manage the estate of the deceased. The beneficiaries identified were the two daughters, Tan Ying and the parents of the deceased. Two suits commenced in the High Court were consolidated and heard together. In Suit 1, Tan Ying sought the removal of the first appellant as co-administrator on the ground of conflict of interest as he was also one of the directors in the companies in Suit 2 and that he had misrepresented to her that despite being illegitimate, the second appellant was entitled to inherit under the laws of intestacy, thereby inducing Tan Ying to include the second appellant as one of the beneficiaries of the estate of the deceased. In Suit 2, the two companies in which the deceased was a director, shareholder and co-owner, sought to recover from the administrators of the estate of the deceased, monies paid under the insurance policy, return of the three cars used by the deceased and a loan allegedly taken by the deceased that remained unpaid. The High Court held, *inter alia*, that the second appellant was an illegitimate child by virtue of the fact that the customary marriage which her parents underwent was not a valid marriage under the LRA and thus, she was not entitled to inherit under the Distribution Act 1958 ('DA'). The High Court also ordered the removal of the first appellant as co-administrator, finding that various actions of the first appellant were 'self-serving and conflicts with his duty as co-administrator' and was barred from making any further application and/or to be appointed as a joint administrator of the estate of the deceased. The claim of the companies in Suit 2 was, however, dismissed for want of proof. The decision was affirmed by the Court of Appeal. In this appeal, the questions raised were: (i) whether the term 'child' as defined in s. 3 of the DA includes a child born of a Chinese customary marriage; (ii) whether the term 'child' in s. 3 of the DA read with s. 75(2) of the LRA includes a child born of a Chinese customary marriage as a legitimate child for succession purposes; (iii) whether the term 'child' and 'issue' in the DA should be read in a non-discriminatory way in the light of art. 8 of the Federal Constitution to include all the natural born children of the deceased; (iv) whether the removal of the appointment of co-administrator by letter of administration duly granted by the High Court can be undertaken other than under the grounds applicable for the revocation of a grant or removal of administrator under s. 34 of the Probate and

A Administration Act 1959 which relates to the interest of the beneficiaries of the estate; and (v) whether the term 'child' in s. 6(1)(g) of the DA applies to all the natural born children of a deceased for succession purposes.

Held (allowing appeal with costs)
Per Mary Lim FCJ delivering the judgment of the court:

B **(1)** The DA regulates the distribution of the estate of any person who has died intestate and also applies to cases of partial intestacy. It does not apply to any person professing the Muslim religion, whereas, in its application to non-Muslims, the DA recognises and anticipates the role of the personal law of non-Muslims. This is when dealing with the C matter of 'child', where the personal law of the deceased permits a plurality of wives. (paras 41, 43 & 44)

(2) With the introduction of s. 17A of the Interpretation Acts 1948 and 1967, the purposive rule of construction prevails over the literal rule of D construction when one is construing statute. The DA has the sole purpose of providing the law for distribution of intestate estate. It does not deal with matters of legitimacy of a child or the validity of a marriage. The distribution must follow the order of succession as set out in s. 6. (paras 49, 51 & 52)

E **(3)** The DA does not, whether expressly or by implication, state that only legitimate children may inherit in the case of intestacy. On the contrary, nowhere in s. 6 is the term 'child' used. What is used is the term 'issue'. It is improper and wrong to ascribe the definition of 'child' to the term 'issue' without more, particularly when both terms are separately F defined in s. 3. Both terms deploy different interpretation features. The term 'issue' utilises the word 'includes' while 'child' is defined in more definitive language with the word 'means'. Generally, the presence of the word 'includes' in the definition of a term suggests an enlarging or non-exhaustive definition as opposed to the use of the more definitive G or comprehensive word 'means', found in the definition of 'child'. (paras 63, 64 & 68)

(4) The term 'issue' in relation to the deceased suggested descendants by blood lineage, not dependent on the matter of legitimacy of the descendant. The definition of 'issue' in s. 3 seeks to statutorily extend H the generational lineage to beyond the immediate persons who may properly be counted as issue, to the offspring or grandchildren, even if the immediate parents of such grandchildren are themselves deceased. The intent in using the word 'issue' as opposed to 'children' in s. 6 is obviously to expand or enlarge the category of persons who may succeed I or inherit, consonant with the purpose of the DA. Consistent with the intent and purpose of the DA, it could not be denied that the second appellant fell within the meaning and scope of the term 'issue' in which

case she was indeed entitled to succeed and inherit under s. 6. As an issue and descendent of her deceased father, her alleged lack of legitimacy did not deprive of her succession under s. 6. (paras 74, 75 & 78)

(5) Although Chinese customary marriages may still be contracted, such marriages must comply with the LRA in respect of solemnisation and registration. Hence, while s. 5(3) of the LRA permits the deceased and Lu YanLiu to marry under any law, religion, custom or usage, s. 5(4) nevertheless requires such marriage to be solemnised in the manner as provided in Part III, namely ss. 22 to 26 of the LRA. There was no evidence that the marriage between the deceased and Lu YanLiu was solemnised in accordance with Part III. What was instead led in evidence was a conduct of a customary marriage involving a traditional dinner with family and friends. Pursuant to s. 75(2) read with s. 75(7) of the LRA, such a marriage which was in contravention of s. 6 was a void marriage. The issue of plurality of wives under the DA thus becomes irrelevant. (paras 92, 93, 96 & 101)

(6) Section 75(2) provides that the child of a void marriage shall be treated as the legitimate child of his parent, if, at the time of the solemnisation of the marriage, both or either of the parties reasonably believed that the marriage was valid. Section 75(2) applies even if there was no petition to declare the Chinese customary marriage a nullity as s. 75(7) defines 'void marriage' to mean a marriage declared to be void under ss. 6, 10, 11, sub-s. 22(4) or s. 72. Evidence was led to the effect that Lu YanLiu had this reasonable belief. Hence, the second appellant was actually a legitimate child entitled to inherit under her late father's estate. (paras 97, 98 & 100)

(7) There was no basis or cause for the removal of the first appellant as joint administrator under s. 34 of the Probate and Administration Act 1959. The welfare of the other beneficiaries was also not weighed when the High Court made the consequential orders for a sale of the family home, which was clearly erroneous. Hence, the order for the removal of the first appellant was in error and must be set aside. (paras 102-108)

Bahasa Melayu *Headnotes*

Tan Kah Yong ('si mati'), yang meninggal dunia tanpa wasiat, meninggalkan seorang isteri, Tan Ying dan seorang anak perempuannya, Tan Sin Lin. Dia juga meninggalkan seorang lagi anak perempuan, Tan Sin Yee ('perayu kedua'), yang lahir lebih dahulu hasil hubungannya dengan Lu YanLiu. Kedua-dua Tan Ying dan Lu YanLiu adalah warganegara China. Si mati juga meninggalkan ibu bapanya dan adik lelaki, Tan Kah Fatt ('perayu pertama'). Perkahwinan antara si mati dan Tan Ying berdaftar bawah Akta Membaharui Undang-undang (Perkahwinan dan Perceraian) 1976 ('Akta 1976') manakala

si mati dan Lu YanLiu hanya melalui perkahwinan adat Cina. Kewujudan perkahwinan adat ini dipertikaikan. Perayu pertama bersama-sama dengan Tan Ying memohon dan memperolehi surat pentadbiran untuk menguruskan harta pusaka si mati. Benefisiari-benefisiari yang dikenal pasti adalah kedua-dua anak perempuannya, Tan Ying dan ibu bapa si mati. Dua guaman yang dimulakan di Mahkamah Tinggi digabungkan dan dibicarakan bersama-sama. Dalam Guaman 1, Tan Ying memohon pembatalan perayu pertama sebagai pentadbir bersama atas alasan konflik kepentingan kerana dia juga salah seorang pengarah dalam syarikat dalam Guaman 2 dan dia telah salah nyatakan pada Tan Ying bahawa walaupun perayu kedua adalah anak tak sah taraf, perayu kedua berhak mewarisi bawah undang-undang harta pusaka tidak berwasiat, dengan itu mendorong Tan Ying untuk memasukkan perayu kedua sebagai salah seorang benefisiari harta pusaka si mati. Dalam Guaman 2, dua syarikat dengan si mati sebagai salah satu pengarah, pemegang saham dan pemilik bersama, memohon untuk mendapatkan semula daripada pentadbir-pentadbir harta pusaka si mati, wang yang dibayar bawah polisi insurans, pemulangan tiga buah kereta yang digunakan si mati dan pinjaman yang dikatakan diambil si mati yang masih belum berbayar. Mahkamah Tinggi memutuskan, antara lain, perayu kedua adalah anak tak sah taraf berdasarkan fakta bahawa perkahwinan adat yang dimasuki ibu bapanya adalah perkahwinan tidak sah bawah Akta 1976 dan dengan itu, tidak berhak untuk pewarisan bawah Akta Pembahagian 1958 ('AP'). Mahkamah Tinggi juga memerintahkan pembatalan perayu pertama sebagai pentadbir bersama, mendapati berbagai tindakan perayu pertama adalah 'self-serving and conflicts with his duty as co-administrator' dan dihalang daripada membuat apa-apa permohonan lanjut dan/atau dilantik sebagai pentadbir bersama harta pusaka si mati. Tuntutan syarikat-syarikat dalam Guaman 2, walau bagaimanapun, ditolak atas ketiadaan bukti. Keputusan itu disahkan oleh Mahkamah Rayuan. Dalam rayuan ini, soalan-soalan yang dibangkitkan adalah: (i) sama ada terma 'anak' yang didefinisikan dalam s. 3 AP termasuk anak hasil perkahwinan adat Cina; (ii) sama ada terma 'anak' dibaca bersama-sama dengan s. 75(2) Akta 1976 termasuk anak yang lahir hasil perkahwinan adat Cina sebagai anak sah untuk tujuan pewarisan; (iii) sama ada terma 'anak' dan 'zuriat' dalam AP perlu dibaca secara tidak mendiskriminasi berdasarkan per. 8 Perlembagaan Persekutuan untuk memasukkan kesemua anak si mati; (iv) sama ada pembatalan pelantikan pentadbir bersama melalui surat pentadbiran yang diberi sewajarnya oleh Mahkamah Tinggi boleh dibuat atas alasan selain daripada yang diguna pakai untuk pembatalan pemberian atau pembatalan pentadbir bawah s. 34 Akta Probet dan Pentadbiran 1959 yang berkait dengan kepentingan benefisiari-benefisiari harta pusaka; dan (v) sama ada terma 'anak' dalam s. 6(1)(g) AP terpakai pada kesemua anak si mati yang lahir untuk tujuan pewarisan.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Mary Lim HMP menyampaikan penghakiman mahkamah:

(1) Akta Pembahagian mentadbir pengagihan harta pusaka orang yang meninggal dunia tanpa wasiat dan juga terpakai untuk kes-kes tanpa wasiat separa. Ini tidak terpakai untuk orang beragama Islam, manakala, untuk penggunaan terhadap orang bukan Islam, AP mengiktiraf dan menjangka peranan undang-undang peribadi orang bukan Islam. Ini adalah apabila berkait perkara 'anak', di mana undang-undang peribadi si mati membenarkan lebih dari seorang isteri.

(2) Dengan pengenalan s. 17A Akta Pentafsiran 1948 dan 1967, kaedah pentafsiran bertujuan mengatasi kaedah harfiah pentafsiran apabila seseorang mentafsir statut. Tujuan tunggal AP adalah memperuntukkan undang-undang pengagihan harta tanpa wasiat. Ini tidak berkait dengan perkara kesahan anak atau kesahan perkahwinan. Pengagihan mesti menurut perintah pewarisan yang dinyatakan dalam s. 6.

(3) Akta Pembahagian, sama ada secara langsung atau secara implikasi, tidak menyatakan hanya anak sah yang boleh mewarisi dalam kes tanpa wasiat. Sebaliknya, tiada di mana-manapun dalam s. 6 terma 'anak' digunakan. Apa yang digunakan adalah terma 'zuriat'. Tidak wajar dan khilaf untuk memberi definisi 'anak' untuk terma 'zuriat', khususnya apabila kedua-dua terma didefinisi dalam s. 3. Kedua-dua terma memberi ciri-ciri pentafsiran berbeza. Terma 'zuriat' menggunakan perkataan 'termasuk' manakala 'anak' didefinisi dalam bahasa yang lebih khusus dengan perkataan 'bermaksud'. Secara amnya, kewujudan perkataan 'termasuk' dalam definisi satu-satu terma mencadangkan definisi yang luas atau tidak menyeluruh berbanding dengan penggunaan perkataan yang lebih muktamad atau komprehensif 'bermaksud', yang didapati dalam definisi 'anak'.

(4) Terma 'zuriat' berkaitan si mati mencadangkan keturunan dengan ikatan darah, bukan bergantung pada perkara kesahan keturunan. Definisi 'zuriat' dalam s. 3 memohon untuk melanjutkan ikatan keturunan secara statutori melampaui orang terdekat yang boleh dianggap sewajarnya sebagai zuriat, kepada anak atau cucu, walaupun jika ibu bapa cucu itu sendiri telah meninggal dunia. Tujuan menggunakan perkataan 'zuriat' berbanding 'anak-anak' dalam s. 6 jelas untuk mengembangkan atau memperluaskan kategori orang yang boleh mewarisi, selari dengan tujuan AP. Konsisten dengan niat dan tujuan AP, tidak boleh dinafikan bahawa perayu kedua terangkum dalam maksud dan skop terma 'zuriat' yang menjadikan dia sememangnya berhak mewarisi bawah s. 6. Sebagai zuriat dan keturunan bapanya, walaupun dia anak tak sah taraf, ini tidak menafikannya daripada pewarisan bawah s. 6.

(5) Walaupun perkahwinan adat Cina masih boleh dimasuki, perkahwinan sedemikian mesti mematuhi Akta 1976 berkaitan pengupacaraan dan pendaftaran. Oleh itu, walaupun s. 5(3) Akta 1976 membenarkan si mati dan Lu YanLiu berkahwin bawah mana-mana undang-undang, agama, adat atau kelaziman, s. 5(4) walau bagaimanapun memerlukan perkahwinan sedemikian diupacarakan dalam cara yang diperuntukkan dalam Bahagian III, iaitu ss. 22 hingga 26 Akta 1976. Tiada keterangan bahawa perkahwinan antara si mati dan Lu YanLiu diupacarakan menurut Bahagian III. Apa yang sebaliknya dikemukakan dalam keterangan adalah perkahwinan adat dijalankan, yang melibatkan makan malam tradisi dengan keluarga dan rakan-rakan. Menurut s. 75(2) dibaca bersama-sama dengan s. 75(7) Akta 1976, perkahwinan sedemikian yang berlawanan dengan s. 6 adalah perkahwinan yang tidak sah. Isu berkaitan lebih dari seorang isteri bawah AP, oleh itu, tidak relevan.

(6) Seksyen 75(2) memperuntukkan bahawa anak hasil perkahwinan yang tidak sah hendaklah disifatkan sebagai anak yang sah taraf pada ibu bapanya, jika, pada masa pengupacaraan perkahwinan tersebut, kedua-dua atau salah seorang pihak itu percaya secara munasabah bahawa perkahwinan itu adalah sah. Seksyen 75(2) terpakai walaupun jika tiada petisyen untuk mengisytiharkan perkahwinan adat Cina itu tidak sah kerana s. 75(7) mendefinisi 'perkahwinan tidak sah' sebagai perkahwinan yang ditetapkan sebagai tidak sah bawah ss. 6, 10, 11, sub-s. 22(4) atau s. 72. Keterangan dikemukakan bahawa Lu YanLiu secara munasabah mempercayai perkara ini. Oleh itu, perayu kedua sebenarnya adalah anak sah taraf yang berhak mewarisi bawah harta pusaka mendiang bapanya.

(7) Tiada asas atau sebab untuk membatalkan perayu pertama sebagai pentadbir bersama bawah s. 34 Akta Probet dan Pentadbiran 1959. Kebajikan benefisiari lain juga tidak dipertimbangkan apabila Mahkamah Tinggi membuat perintah sampingan untuk jualan rumah keluarga, yang jelas khilaf. Oleh itu, perintah pembatalan perayu pertama adalah khilaf dan mesti diketepikan.

Case(s) referred to:

AJS v. JMH & Another Appeal [2022] 1 CLJ 331 FC ***(refd)***
Bursa Malaysia Securities Bhd v. Mohd Afrizan Husain [2022] 4 CLJ 657 FC ***(refd)***
Chai Siew Yin v. Leong Wee Shing (Civil Appeal No: 02-10-2003(W) ***(refd)***
Cheang Thye Pin & Ors v. Tan Ah Loy [1920] AC 369 ***(refd)***
Corporation Of Portsmouth v. Smith 13 QBD 184 ***(refd)***
Damayanti Kantilal Doshi & Ors v. Jigarlal Kantilal Doshi & Ors [1998] 4 CLJ 81 CA ***(refd)***
Dilworth v. Commissioner Of Stamps (1899) AC 99 ***(refd)***
Fulham Parish v. Woolwich Union [1907] AC 255 ***(refd)***
Galloway v. Galloway (Ex parte) [1955] All ER 429 ***(refd)***
Hariharan v. Reserve Bank Of India [2000] 3 LRC 71 ***(refd)***
Harrison v. Harrison [1951] 2 All ER 346 ***(refd)***

Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 3 CLJ 145 FC ***(refd)***
Ipoh Garden Sdn Bhd v. Ismail Mahyuddin Enterprise Sdn Bhd [1975] 1 LNS 66 HC ***(refd)***
Khoo Hooi Leong v. Khoo Hean Kwee [1926] AC 529 ***(refd)***
Khor Liang Keow lwn. Tee Ming Kook [1996] 2 CLJ 631 HC ***(refd)***
Letitia Bosman v. PP & Other Appeals [2020] 8 CLJ 147 FC ***(refd)***
Letterstedt v. Broers [1884] 9 AC 371 ***(refd)***
Ligar Fernandez v. Eric Claude Cooke [2002] 6 CLJ 152 HC ***(refd)***
Minister Of Home Affairs & Anor v. Collins Macdonald Fisher & Anor [1980] AC 319 ***(refd)***
Morris v. Britannic Assurance Co Ltd [1931] 2 KB 125 ***(refd)***
Pang Chuan Cheong & Ors v. Oh Kwong Foi & Ors [2007] 8 MLJ 354 ***(refd)***
PP v. Gan Boon Aun [2017] 4 CLJ 41 FC ***(refd)***
Re Estate Of Liu Sinn Min, Deceased [1974-1976] SLR(R) 143 ***(refd)***
Reed v. Reed 404 US 71 ***(refd)***
Rex v. Latip Haidin [1935] 1 LNS 72 HC ***(refd)***
Soniya Chataram Aswani v. Haresh Jaikishin Buxani [1995] SGHC 169 ***(refd)***
Sydall v. Castings Ltd [1966] 3 All ER 770 ***(refd)***
T v. O [1994] 4 CLJ 593 HC ***(refd)***
Tan Siew Sen & Ors v. Nick Abu Dusuki Hj Abu Hassan & Anor [2016] 6 CLJ 18 CA ***(refd)***
Tejkumar v. AK Menon AIR 1997 SC 442 ***(refd)***
Tenaga Nasional Bhd v. Majlis Daerah Segamat [2022] 2 CLJ 497 FC ***(refd)***

Legislation referred to:
Births and Deaths Registration Act 1957, s. 13
Capital Markets and Services Act 2007, s. 378
Distribution Act 1958, ss. 3, 4, 5(1), (2), 6(1)(a), (b), (c), (d), (e), (f), (g), (h), (j), (2), 7, 9, 10
Federal Constitution, arts. 8, 12(4), 160(2), 161A(6)(a)
Interpretation Acts 1948 and 1967, s. 17A
Law Reform (Marriage and Divorce) Act 1976, ss. 1, 3, 4, 5(1), (2), (3), (4), 6, 10, 11, 21(3), 22(1), (3), (4), 23, 24, 25(1), 26, 34, 69, 75(2), (3), (7)
Legitimacy Act 1961, s. 11(1)
Probate and Administration Act 1959, s. 34

For the appellants - Cyrus Das, AG Kalidas & Jasmin Raj; M/s K Nadarajah & Partners
For the respondent - Loh Chang Woo & Nurul Hafeeza Mohd Zaidi; M/s CW Loh & Assocs

[Editor's note: For the Court of Appeal judgment, please see Tan Kah Fatt & Anor v. Tan Ying & Another Appeal [2021] 1 LNS 264 (overruled); High Court judgment [2018] 1 LNS 1084 (overruled).]

Reported by S Barathi

A

JUDGMENT

Mary Lim FCJ:

My learned brother, Abdul Rahman bin Sebli, CJSS and my learned sister, Hasnah binti Mohammed Hashim, FCJ have read this judgment in draft and have agreed that this judgment forms the unanimous judgment of this court.

B

[1] While there are two central issues for this court's consideration, the real issue here concerns the right of illegitimate children to inherit under the laws of intestacy in this country. This question vexes the non-Muslim community due to the interplay of two key legislations in this respect – the Distribution Act 1958 (Act 300) and the Law Reform (Marriage and Divorce) Act 1976 (Act 164). The claim to this right sometimes, unfortunately, strains relationships with the innocent child caught in nether land. Often, the existence of the illegitimate child is not known until one of the parents has demised, and there is no provision for such children, *inter vivos*. The circumstances in the present appeal are a clear illustration although the existence of the so-called 'illegitimate' child was well-known. She was and is very much part of the larger extended family.

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[2] These are the four amended questions posed for our determination:

(i) Whether the term 'child' as defined in s. 3 of the Distribution Act 1958 includes a child born of a Chinese customary marriage?

E

(ii) Whether the term 'child' in s. 3 of the Distribution Act 1958 read with s. 75(2) of the Law Reform (Marriage and Divorce) Act 1976 includes a child born of a Chinese customary marriage as a legitimate child for succession purposes?

F

(iii) Whether the term 'child' and 'issue' in the Distribution Act 1958 should be read in a non-discriminatory way in the light of art. 8 of the Federal Constitution to include all the natural born children of the deceased?

(iv) Whether the removal of the appointment of co-administrator by letter of administration duly granted by the High Court can be undertaken other than under the grounds applicable for the revocation of a grant or removal of administrator under s. 34 of the Probate and Administration Act 1959 which relates to the interest of the beneficiaries of the estate?

G

An additional question, "Whether the term 'child' in s. 6(1)(g) of the Distribution Act 1958 applies to all the natural born children of a deceased for succession purposes?" was allowed on 25 January 2021.

H

Underlying Facts

[3] Two suits, namely Civil Suit No: 22NcVC-297-06-2015 (Suit 1) and Civil Suit No. BA-22NcVC-571-10-2016 (Suit 2) consolidated at the High Court *vide* order of court dated 15 March 2016, were heard together at the High Court.

I

[4] Suit 1 is an action taken by Tan Ying, a joint-administrator, to remove Tan Kah Fatt, the other administrator of the estate of Tan Kah Yong, deceased, leaving Tan Ying as the sole administrator. Suit 2 is initiated by Y Teq Motors Sdn Bhd and YE Motorcycles Sdn Bhd, two companies where the deceased was a director, shareholder and co-owner. The deceased was also the registered owner of three cars. He had also taken out a life insurance policy with AIA where the pay-out upon his death was a sum of RM6,689,542.01. The two companies sought to recover from the administrators of the estate of the deceased, monies paid under the insurance policy, return of the three cars used by the deceased as well as a loan allegedly taken by the deceased that remained unpaid. According to the two companies, the insurance policy was for the protection of the business of the companies and with the demise of the deceased, the monies paid out under the policy belong to the companies.

[5] Both suits arose following the death of Tan Kah Yong who passed away on 7 October 2012 due to a motor-vehicle accident. He died intestate. He left behind a wife, Tan Ying whom he married on 18 January 2005 and a daughter, Tan Sin Lin born on 2 January 2009. He also left behind another daughter named Tan Sin Yee, the second appellant who was born earlier on 8 October 2002 from his relationship with Lu YanLiu. Both Tan Ying and Lu YanLiu are Chinese nationals. Tan Ying and her daughter have since returned to China and they now reside there. The deceased was also survived by his parents and his younger brother, Tan Kah Fatt, the co-administrator mentioned earlier.

[6] The marriage between the deceased and Tan Ying was registered under the Law Reform (Marriage and Divorce) Act 1976 (Act 164) while the deceased and Lu YanLiu only underwent a Chinese customary marriage. The existence of this customary marriage is under challenge. Lu YanLiu has since remarried and is a permanent resident here. The birth of the second appellant was registered under s. 13 of the Births and Deaths Registration Act 1957 (Act 299), a provision governing the registration of illegitimate children.

[7] On 7 October 2013, Tan Kah Fatt together with Tan Ying applied for and were granted the letters of administration to manage the estate of the deceased. The beneficiaries identified were the two daughters, Tan Ying, and the parents of the deceased.

[8] In Suit 1, Tan Ying asked for Tan Kah Fatt to be removed as co-administrator on the ground of conflict of interest as he is also one of the directors in the companies in Suit 2; that he had misrepresented to her that despite being illegitimate, Tan Sin Yee was entitled to inherit under the laws of intestacy thereby inducing Tan Ying to include Tan Sin Yee as one of the beneficiaries of the estate of the deceased. Tan Ying claimed that it was only after the assets had been distributed that she learnt otherwise to be the correct position in law. Tan Ying thus sought a declaration to the effect that Tan Sin

A Yee, as an illegitimate child, does not have a legal right to claim an interest in the estate of the deceased and was consequentially obliged to return monies already received.

[9] Tan Kah Fatt and Tan Sin Yee who are the appellants before us, counterclaimed in Suit 1, seeking expenses for Tan Sin Yee's education and
B upbringing, and a declaration that she was entitled to 25% of the estate of the deceased on the basis of a purported trust set up for her benefit.

Decision Of The High Court

[10] The learned judge decided that Tan Sin Yee, the second appellant, is
C an illegitimate child by virtue of the fact that the customary marriage which her parents underwent was not a valid marriage under the Law Reform (Marriage and Divorce) Act 1976 (Act 164). As an illegitimate child, she was thus not entitled to inherit under the Distribution Act 1958 (Act 300).

[11] On the issue of removal of Tan Kah Fatt, the first appellant, as
D co-administrator, the learned judge found various actions of Tan Kah Fatt were "self-serving and conflicts with his duty as co-administrator". Consequently, the High Court held that in the circumstances of the case, it was just to remove him immediately as joint administrator of the estate of the deceased; that his conduct and position of conflict to be most unsuitable
E to hold such a position. Aside from removing Tan Kah Fatt, the High Court also barred him from making any further application and/or to be appointed as a joint administrator of the estate of the deceased. Because Tan Ying is a foreigner, a Chinese National and her daughter still a minor, the High Court decided to enjoin Amanah Raya Berhad as the joint administrator. Other
F orders issued included:

(i) an account detailing and setting out all movable and immovable assets of the deceased held and/or in the possession of and/or utilised by Tan Kah Fatt and/or in the hands and/or possession of or being utilised by other third parties;

G (ii) Tan Kah Fatt to give full and frank disclosure of all information, details and matters pertaining to the above;

(iii) damages for misrepresentation of facts to Tan Ying;

(iv) sale of certain property.

H **[12]** The claim of the companies in Suit 2 was, however, dismissed for want of proof.

Decision Of The Court Of Appeal

[13] Both decisions of the High Court were upheld by the Court of Appeal.

I **[14]** Principally, in relation to the appeal from Suit 1, the Court of Appeal found the High Court had adopted the correct approach as applied in *Ligar Fernandez v. Eric Claude Cooke* [2002] 6 CLJ 152; [2002] 5 MLJ 177 for the

removal of a co-administrator. The Court of Appeal further agreed with the High Court that the respondent had discharged the burden of proving sufficient cause as there was more than a reasonable or strong suspicion that Tan Kah Fatt had acted in conflict of interest as an administrator which warranted his removal as administrator. Consequently, the Court of Appeal declined to interfere in the findings of fact by the High Court as there were no substantial or compelling reasons to do so.

[15] Similarly, the Court of Appeal agreed with the High Court's findings that Tan Sin Yee is an illegitimate child and that as an illegitimate child, she was not entitled to inherit from the deceased's estate under ss. 3 and 6 of the Distribution Act 1958 (Act 300). The Court of Appeal also agreed that the existence of a trust had not been established.

[16] Dissatisfied, both Tan Kah Fatt and Tan Sin Yee sought leave to appeal to the Federal Court and on 15 October 2019, leave was granted to refer four questions of law which were subsequently amended to the questions as set out earlier.

Summary Of Submissions

[17] The parties have addressed the questions posed in two parts – the issue of the right of an illegitimate child to inherit under the laws of intestacy and, the issue of removal of administrators.

[18] On the first issue, the appellants make the principal argument that Tan Sin Yee, the second appellant, is entitled to inherit under s. 6 of the Distribution Act 1958 (Act 300) as she falls within the meaning of "child", defined in s. 3 of Act 300. Section 3 is said to carry two enabling limbs – a child means a legitimate child and also a child of a Chinese customary marriage where the personal law of the deceased recognises a plurality of wives.

[19] The second appellant is said to qualify for inheritance under the first limb of s. 3 of Act 300 by reason of s. 75(2) read with s. 3 of the Law Reform (Marriage and Divorce) Act 1976 (Act 164).

[20] Learned counsel argued that even if her parents' marriage is void, s. 75(2) of Act 164, as considered by Shankar J (as His Lordship then was) in *T v. O* [1994] 4 CLJ 593; [1993] 1 MLJ 168; [1994] 3 AMR 2402, saves the second appellant from the stigmatisation of illegitimacy if both her parents reasonably believed the marriage to be valid at the time of marriage. As decided in *T v. O* and followed in *Khor Liang Keow lwn. Tee Ming Kook* [1996] 2 CLJ 631; [1995] 4 MLJ 629, the conduct of the parties after the marriage was a good indicator of that reasonable belief. On the facts, the deceased and Lu YanLiu had undergone a Chinese customary marriage; lived together for three years as a couple; both before and after the birth of the second appellant and had registered themselves as the father and mother of the second appellant; and that the parents of the deceased had accepted the

second appellant as their lawful grandchild. On the facts too, the High Court is said to have found the existence of a customary or traditional marriage but had held it to be invalid because it was not registered, as required under the provisions of Act 164. In addition, the second appellant's late father, a Malaysian citizen, was domiciled and residing in Malaysia at the time of the marriage. He also carried on business in Klang, thus meeting the conditions in s. 75(3) of Act 164.

[21] Learned counsel for the appellants pointed out that s. 75(2) of Act 164 was unfortunately not drawn to the High Court's attention; hence it was not addressed by the High Court. As such, the conclusion of the High Court that the second appellant "is therefore an illegitimate child for all legal purposes" is said to be erroneous and *per incuriam*.

[22] It was further argued that the second appellant would also qualify for inheritance under the enlarged definition of 'child' in s. 3. According to learned counsel, Act 164 does not abolish the personal law of non-Muslims; all it does is to de-recognise polygamy as a feature of Chinese and Hindu personal laws, and it does so for the succession purposes as seen in s. 6(2) of Act 300. Through ss. 5(1) and (2), pre-existing and, to a limited extent, post-Act customary marriages are recognised whilst a child of any post-Act customary marriage which marriage is void under s. 5(4) is specifically preserved under s. 75(2).

[23] The appellants find support for their propositions from both the *Royal Commission Report on Non-Muslim Marriage* and *Divorce Laws* published in 1971 and from case laws.

[24] First, the *Royal Commission Report* made the following observations about Chinese customary marriages – that the personal law of the Chinese is based on race; that the courts have recognised polygamous unions among the Chinese for the purposes of succession; and all wives of plural unions have equal rights. As for case law, the Privy Council in *Khoo Hooi Leong v. Khoo Hean Kwee* [1926] AC 529 and *Cheang Thye Pin & Ors v. Tan Ah Loy* [1920] AC 369 have held that under Chinese personal law, the children of secondary wives are regarded as legitimate and 'entitled to inherit equally with his children'; that no particular form of marriage ceremony was necessary for a Chinese customary marriage to be recognised; that "the only essential legal requirement of a Chinese customary marriage is that the marriage must be consensual. The ingredients of a ceremony, formal contract, repute of marriage and so on are treated as being evidential only and not essential." These rights are said to be retained and "embodied" in Act 300 in the earlier mentioned enlarged definition of "child" in s. 3 and by the declaration in s. 6(2) of an equal succession rights of plural wives.

[25] An alternative argument under art. 8 of the Federal Constitution was also raised, the suggestion being that drawing a distinction between all-natural born children of the deceased on ground of legitimacy offends the guarantee of equality in art. 8. Since the succession provision in s. 6 of Act 300 speaks only of "issue" when referring to child or children and their descendants for succession purposes, the definition of "issue" in s. 3 which refers to children of the deceased without making a distinction between legitimate and illegitimate child or children, is pertinent. A constitutional reading of Act 300 was urged upon us, that is, to interpret the statute in such a way as to preserve constitutionality. See *Tejkumar v. AK Menon* AIR 1997 SC 442; *Minister Of Home Affairs & Anor v. Fisher Collins MacDonald & Anor* (1980) AC 319; *Hariharan v. Reserve Bank Of India* (2000) 3 LRC 71; *Reed v. Reed* 404 US 71; *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145; [2018] 1 MLJ 545; [2018] 2 AMR 313.

[26] On the second issue which relates to the matter of removal of administrators and executors, s. 34 of the Probate and Administration Act 1959 requires the establishment of 'sufficient cause' before any probate or letters of administration may be revoked. In this regard, the Privy Council in *Letterstedt v. Broers* [1884] 9 AC 371 (followed in *Damayanti Kantilal Doshi & Ors v. Jigarlal Kantilal Doshi & Ors* [1998] 4 CLJ 81; [1998] 4 MLJ 268 opined that the "main principle on which such jurisdiction should be exercised is the welfare of the beneficiaries and of the trust estate".

[27] The first appellant pointed out that the High Court failed to adequately consider this test in that while the first appellant was removed and replaced by Amanah Raya Berhad, the respondent remained as administrator. This was unjustified and breaches the rules for good administration of the estate of the deceased as the position taken by the respondent was that only her daughter was entitled to the whole of the children's share. Together with the respondent's share as the wife of the deceased, the respondent and her daughter would be entitled to 75% of the insurance monies. In monetary terms, this works out to RM5.017 million of the insurance pay-out of RM6.689 million. To promote objectivity and an impartial administration of the estate, only the Amanah Raya Berhad should have been appointed as the sole administrator to ensure proper distribution of the insurance proceeds in the portions as finally decreed by this court.

[28] These were the responses of the respondent.

[29] First, a preliminary objection was raised to the effect that the first set of questions are academic and hypothetical as the existence of the Chinese customary marriage between the deceased and the mother of the second appellant was not established at the High Court. The traditions which are generally relied on to prove the existence of such a marriage were simply not present. The birth certificate of the second appellant further invited an

A inference that there was no valid marriage at the time of her birth – the registration of birth was pursuant to s. 13 of the Births and Deaths Registration Act 1957 (Act 299). As a result of this finding, there were no submissions by the appellants at the Court of Appeal and consequently, no deliberations by the Court of Appeal on this point. This court was thus
B invited to disallow these questions.

[30] In any case, the respondent argued that the answers to these questions were clearly in her favour. Section 3 of Act 300 is clear on its face, unambiguous, uncontroversial and there is no *lacuna*. For the purpose of Act 300, the term "child" only includes legitimate child and child adopted under
C the provisions of the Adoption Act 1952 (Act 257) in which case the second appellant is excluded as a beneficiary under s. 6 of Act 300. It was also submitted that if the court was to give an interpretation which was against the clear express terms of the provision, that would run contrary to the function and role of the court; that had Parliament intended to allow for an
D illegitimate child to inherit under the laws of intestacy, there would have been express provisions to that effect.

[31] Learned counsel for the respondent maintained that amendments to Act 300 in 1997 did not make any provision "to improve the legal rights of illegitimate child" to the estate of their intestate parents. In other words, the
E position of no right to inherit under intestacy laws remained the same.

[32] The intention of Parliament to exclude the illegitimate child from the term child under s. 3 of the Distribution Act 1958 is said to be "crystal clear", as further evident from the debates in Parliament during the tabling of amendments to Act 300 – see Hansard on Parliament Debate dated
F 5 August 1997.

[33] As for the interplay of the Law Reform (Marriage and Divorce) Act 1976 (Act 164) with Act 300, the respondent submitted that registration of marriages is a "blanket requirement applicable to all persons who fall within the ambit of the Act regardless of their customs". Otherwise, again, the
G intention of Parliament in enacting Act 164 in order to provide for monogamous marriages and the solemnisation and registration of such marriages, would be defeated. Consequently, it would be wrong to consider a child of a Chinese customary marriage which is not registered under Act 164 as, legitimate, would 'go against the legislature's intention'.

H

[34] Insofar as s. 34 of Act 164 is concerned, that it 'validates any unregistered customary marriage after the coming into force' of Act 164, has been settled by the Federal Court in *Chai Siew Yin v. Leong Wee Shing* when it overturned the Court of Appeal's decision in Civil Appeal No: 2-10-2003(W). This was pointed out by the Court of Appeal in *Tan Siew Sen*
I *& Ors v. Nick Abu Dusuki Hj Abu Hassan & Anor* [2016] 6 CLJ 18; [2016] 4 MLJ 602; [2016] 3 AMR 787, citing the brief unreported oral judgment of the Federal Court as follows:

Having heard the detailed arguments and having considered the relevant provisions of the Law Reform (Marriage and Divorce) Act 1976 and in the circumstances of this case, we are unanimous in our decision that this appeal be allowed.

We are not in agreement with the reasoning of the judgments both in the High Court and the Court of Appeal.

Section 34 of the said Act should not be read in isolation, but in harmony with the other provisions of the Act which encapsulate the overall intention of the Legislature in enacting the Act. To do otherwise would defeat the purpose and intention of the Act which was enacted to 'provide for monogamous marriages and the solemnisation and registration of such marriages'.

[35] Since it is undisputed that the 'alleged customary marriage' was never registered, then Lu YanLiu was never legally married to the deceased at the material time under Act 164. Consequently, the second appellant is illegitimate and is not entitled to the estate of the deceased under Act 300.

[36] According to the respondent, illegitimate children may only inherit from the estate of the intestate mother – see s. 11(1) of the Legitimacy Act 1961 (Act 60). The fact that there is specific law governing the rights of illegitimate children to inherit property from the mother indicates the intention of Parliament not to include illegitimate child/children in Act 300.

[37] On the contentions of unconstitutionality, the respondent makes the argument that although s. 3 discriminates against illegitimate children, it does not violate art. 8 of the Federal Constitution. Following *Letitia Bosman v. PP & Other Appeals* [2020] 8 CLJ 147; [2020] 5 MLJ 277; [2020] 6 AMR 801, there is a clear nexus between the classification of legitimate and illegitimate children with the objective of regulating the distribution of the intestate estate amongst the rightful beneficiaries.

[38] Learned counsel for the respondent submitted that the fundamental rights provided under the Federal Constitution must be balanced with the greater interests of society; and that holding otherwise would "open the floodgate for illegitimate child to claim from the estate of their intestate parents as of right". The Malaysian society is said to still hold a core value in preserving the value of family structure as monogamous and to protect the interests of rightful heirs under legally recognised marriages; and that the social norm in Malaysia does not regard the status of an illegitimate child to be the same as that of a legitimate child. Learned counsel added that "the policy of this country is that the institution of marriage which acts as the bedrock of the family unit should be protected, strengthened and safeguarded as an institution. Should there be any shift in the consensus of society, the legislature shall be the appropriate and right forum to cause such change in the law instead of the judiciary".

A **[39]** Finally, the issue of removal of the co-administrator. The respondent submitted that the High Court had found on the facts, sufficient cause for the first appellant's removal and this was affirmed on appeal. This was an exercise of discretion which ought not to be disturbed, that the test applied objectively was met on the facts and circumstances of the case.

B **Decision**

[40] The first set of questions, in essence, seek to establish that the second appellant is not an illegitimate but a natural born child of a deceased father and as such is entitled to inherit under the Distribution Act 1958 (Act 300). The last question deals with the matter of removal of a co-administrator.

C *(i) Succession Under The Distribution Act 1958 (Act 300)*

[41] The Distribution Act 1958 (Act 300) regulates the distribution of the estate of any person who has died intestate, that is, a person who died without leaving any will prescribing on or for the distribution of the intestate's estate.
D This is an important aspect of this Act which seems to have been overlooked by many, and it is an aspect which I will return to shortly. Act 300 also applies to cases of partial intestacy, where a person dies testate but has for some reason or other, made no provision in the will as to the beneficial interest of any property in the estate.

E **[42]** Act 300 applies only in West Malaysia and pursuant to Modification of Laws (Distribution Act 1958) (Extension to the State of Sarawak) Order 1986 [P.U. (A) 446/86] applies too, in the State of Sarawak, with effect from 28 February 1986. Sabah has its own specific law on distribution of intestate estates under the Intestate Succession Ordinance 1960 (Sabah No. 1 of 1960).

F **[43]** Another material feature of Act 300 is the fact that it does not apply to any person professing the Muslim religion, whether in West Malaysia or Sarawak. It also does not apply to any estate where the distribution is governed by the Parsee Intestate Succession Ordinance of the Straits Settlement (SS Cap 54) – see s. 2. In the case of Sarawak, Act 300 further
G does not apply to the distribution of the estate of any natives of Sarawak, "native" as defined in art. 161A(6)(a) of the Federal Constitution.

[44] In its application to non-Muslims, Act 300 recognises and anticipates the role of the personal law of non-Muslims. This is when dealing with the
H matter of "child", where the personal law of the deceased permits a plurality of wives. I shall deal with this too, in greater detail later.

[45] Act 300 has only ten sections, each no less important than the other. Typical of almost all legislation, the interpretation provision in s. 3 seeks to define six terms used in the Act but the meaning assigned in s. 3 is caveated
I with the words "unless the context otherwise requires". This reminds that the meanings provided in s. 3 to the specific terms may need to be reconsidered depending on the context such terms are used in the Act. This

interpretative tool is frequently deployed in legislation and care must be exercised when attempting to discern the appropriate meaning to be accorded to any particular term.

[46] There is a plethora of cases dealing with the principles of statutory interpretation, the latest being this court's decision in *Bursa Malaysia Securities Bhd v. Mohd Afrizan Husain* [2022] 4 CLJ 657; [2022] MLJU 502; [2022] 4 AMR 641. There, the Federal Court was invited to rule on the proper construction of r. 16.11(2) of the ACE (Access, Certainty, Efficiency) Market Listing Requirements, issued pursuant to s. 378 of the Capital Markets and Services Act 2007 (Act 671). Rule 16.11(2) set out the circumstances when a corporation "shall" be delisted. A plain and grammatical *in vacuo* reading of r. 16.11(2), without thought or consideration to the other listing requirements and provisions of the parent Act 671, would have meant that a corporation had to be delisted the moment it was wound-up; a conclusion reached by the Court of Appeal.

[47] Just prior to this decision, the majority of the Federal Court in *AJS v. JMH & Another Appeal* [2022] 1 CLJ 331; [2022] 1 MLJ 778; [2022] 1 AMR 617, had held that the standard canon of construction has always been that the courts should, in usual cases, begin with the literal rule and that the purposive rule only ought to be relied on where there is ambiguity. In this, the latest of our decisions, the Federal Court has taken a markedly different approach when it disagreed with the Court of Appeal and concluded that the word "shall" used in r. 16.11(2) did not carry the meaning assigned by the Court of Appeal and as generally understood.

[48] What this court did in *Bursa Malaysia Securities Bhd v. Mohd Afrizan Husain* was to examine, amongst others, the functions and duties of Bursa Malaysia. This court then opined that a contextual construction with the purposive rule of construction as statutorily enunciated in s. 17A of the Interpretation Acts 1948 and 1967 (Act 388) must be conducted:

> [48] The question or issue that then follows is whether it is correct to construe a provision like r. 16.11(2) such that the text is read or interpreted grammatically, and *in vacuo*, without consideration of the surrounding words and purpose and object of the AMLR and the CMSA? Namely with no consideration for context?
>
> [49] We have previously concluded that the AMLR has statutory force. As such the provisions of the AMLR should be construed within the purview of, and in accordance with the principles and objectives of the CMSA. This is particularly so given that the CMSA comprises the source of the AMLR. In order to do so, it is necessary to first, construe the CMSA, the statutory interpretation of which is governed by s. 17A into the Interpretation Acts 1948 and 1967.
>
> [50] Malaysian law requires that the interpretation of an Act be undertaken with the purpose and object of the Act in mind. Section 17A of the Interpretation Acts 1948 and 1967 provides as follows:

A

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

B

> Please see also *Tebin Mostapa v. Hulba-Danyal Balia & Anor* [2020] 7 CLJ 561 ("*Tebin*'s case").
>
> [51] It is clear from the wording of s. 17A that any reading which is purely textual, as opposed to contextual, is to be rejected.

[49] Having undertaken that exercise, this court found that the approach C adopted by the Court of Appeal was clearly erroneous. In short, with the introduction of s. 17A of Act 388, the purposive rule of construction prevails over the literal rule of construction when one is construing statute. The literal rule of construction must give way to the purposive rule and in discerning the meaning borne in the terms used in any particular legislation, the courts D must favour a construction which promotes the purpose, object or intent of the legislation over a construction which does not. I would add that such an approach does not wait for the state of ambiguity to present before the purposive approach is adopted and applied.

[50] Consonant with that approach which surely makes cogent sense, I turn E then to the purpose of Act 300. As mentioned earlier, this aspect was not regarded at all by the courts below.

[51] First, the purpose of Act 300 as discerned from its long title is that it is "An Act relating to the law of distribution of intestate estates". That is the long and short of the clear purpose and intent of this Act – it contains the F laws dealing with the distribution of the estate of a person who died intestate. It does not deal with matters of legitimacy of a child or the validity of a marriage unless of course, it is specifically spelt out in the provisions of the Act itself; or there is a direction that any particular term in the Act bears the meaning as ascribed under any other specific law. For instance, s. 3 provides G that the term "native" has "the same meaning assigned to it in art. 161A(6)(a) of the Federal Constitution".

[52] This aspect of Act 300 is critical to the proper understanding of what is obviously a rather old piece of legislation, enacted shortly after independence in 1957. When it was first enacted in 1958, it repealed four H other pieces of similar legislation – see s. 10. Since its enactment, the Act has been amended twice, once in 1975 *vide* Distribution (Amendment) Act 1975 (Act A281) with effect from 28 February 1975; the second time *vide* Act A1004 with effect from 31 August 1997. As correctly pointed out by the respondent, none of these amendments sought to deal with the question of I legitimacy of a child. This is hardly surprising given that the Act is not enacted for such purpose; it has the sole purpose of providing the law for distribution of intestate estate.

[53] Next, there are three distinct features in Act 300. First, the Act applies to regulate the distribution of all immovable and movable property of the deceased if they are domiciled in West Malaysia and Sarawak. This is by necessary inference from the terms of s. 4. This is not an issue of concern in this appeal since the deceased was domiciled in West Malaysia at the time of his death.

[54] The second feature is the recognition and provision in s. 5 that "for the purpose of distribution under this Act, there shall be no distinction between those who are related to the deceased through his father and those who are related to him through his mother"; and whether the relation to the deceased is by full or half blood. Section 5 further provides that there is also no distinction between those who are actually born in the lifetime of the deceased or who at the time of his death, were only conceived in the womb but who were born alive after the deceased's passing. Again, these significant provisions appear to have escaped the attention of the courts below when determining the issues. In short, distribution under the Act adopts the principle of parity and a person is potentially a beneficiary so long as some lineal blood connection with the deceased can be established.

[55] The third feature of the Act is that in the distribution of the estate of the intestate, the intent is to distribute the whole or entire estate "except insofar as the same consists of land". This is evident from the terms of s. 6(1)(j) where the default position after exhausting the scheme or order of distribution as provided in s. 6(1) is, the estate will fall to the Government, following the concept of *bona vacantia*.

[56] With all those principles at the forefront of this determination, I turn then to s. 6 of Act 300 which is central in this appeal. Section 6 provides for the order of succession to intestate estates:

> 6. (1) After the commencement of this Act, if any person shall die intestate as to any property to which he is beneficially entitled for an interest which does not cease on his death, such property or the proceeds thereof after payment thereout of the expenses of due administration *shall,* subject to the provisions of section 4, *be distributed in the manner* or be held on the trusts *mentioned in this section, namely:*
>
> (a) if an intestate dies leaving a spouse and no issue and no parent or parents, the surviving spouse shall be entitled to the whole of the estate;
>
> (b) if an intestate dies leaving no issue but a spouse and a parent or parents, the surviving spouse shall be entitled to one-half of the estate and the parent or parents shall be entitled to the remaining one-half;
>
> (c) if an intestate dies leaving issue but no spouse and no parent or parents, the surviving issue shall be entitled to the whole of the estate;

A (d) if an intestate dies leaving no spouse and no issue but a parent or parents, the surviving parent or parents shall be entitled to the whole of the estate;

(e) if an intestate dies leaving a spouse and issue but no parent or parents, the surviving spouse shall be entitled to one-third of the
B estate and the issue the remaining two-thirds;

(f) if an intestate dies leaving no spouse but issue and a parent or parents, the surviving issue shall be entitled to two-thirds of the estate and the parent or parents the remaining one-third;

(g) if an intestate dies leaving a spouse, issue and parent or parents, the surviving
C *spouse shall be entitled to one-quarter of the estate, the issue shall be entitled to one-half of the estate and the parent or parents the remaining one-quarter;*

(h) subject to the rights of a surviving spouse or a parent or parents, as the case may be, the estate of an intestate who leaves issue shall be held on the trusts set out in section 7 for the issue;

D (i) if an intestate dies leaving no spouse, issue, parent or parents, the whole of the estate of the intestate shall be held on trusts for the following persons living at the death of the intestate and in the following order and manner, namely:

Firstly, on the trusts set out in section 7 for the brothers and sisters
E of the intestate in equal shares; but if no person takes an absolutely vested interest under such trusts, then

Secondly, for the grandparents of the intestate, and if more than one survive the intestate in equal shares absolutely; but if there are no grandparents surviving, then

F Thirdly, on the trusts set out in section 7 for the uncles and aunts of the intestate in equal shares; but if no such person takes an absolutely vested interest under such trusts; then

Fourthly, for the great grandparents of the intestate and if more than one survive the intestate in equal shares absolutely; but of
G there are no such great grandparents surviving, then

Fifthly, on the trusts set out in section 7 for the great grand uncles and great grand aunts of the intestate in equal shares.

(j) In default of any person taking an absolute interest under the foregoing provisions the Government shall be entitled to the whole
H of the estate insofar as the same consists of land. (emphasis added)

[57] These are my observations on s. 6.

[58] The order of statutory succession is structured. The distribution is in order of priority for the deceased's own immediate family first before
I radiating to the extended family and those connected with him by bloodline, whether on the matriarchal or patriarchal side of the deceased. The distribution starts with the spouse of the deceased who stands to inherit or be distributed the entire or whole estate if there is no issue or parent(s).

Where there is present either spouse, issue or parent, then the distribution will follow the order set out in ss. 6(1)(a) to (h), depending on who survives the deceased. Where there are neither spouse, issue or parent(s) or even granduncles or grandaunts surviving the deceased, the default position is one of *bona vacantia*, the Government is entitled to the whole estate except insofar as the estate consists of land – see s. 6(j).

[59] The second observation concerns the proportion of the estate that is distributed amongst the surviving family of the deceased. Where a spouse and a parent(s) survive the deceased with no issue, s. 6(1)(b) provides for an equal distribution between the spouse and the parent(s). However, the moment the deceased is survived by issue, then the issue always takes the substantial share – see ss. 6(1)(e), (f) and (g).

[60] The third observation is the use of the term, "issue" in s. 6(1) as opposed to the word, "child". And, this takes me right into the heart of the appeal before us.

[61] There is no reference to the term "child" in s. 6 at all. The only term used is "issue". The argument of the respondent is that this definition when read with the definition for "child", leaves no room for the inclusion of illegitimate children such as the second appellant; an argument seemingly adopted wholesale by both the High Court and the Court of Appeal.

[62] With respect, I disagree for several reasons.

[63] First, as pointed out at the outset, the object or purpose of Act 300 is to provide for the distribution of the deceased's estate amongst those who survive the deceased. That distribution must further follow the order of succession as set out in s. 6. This is clear from the use of the term 'shall' in s. 6(1). Abiding by the order prescribed in s. 6 does not in the least, detract from the primary purpose of the Act. All it means is there is an ordered or organised distribution according to succession.

[64] Second, Act 300 does not, whether expressly or by implication, state that only legitimate children may inherit in the case of intestacy. On the contrary, nowhere in s. 6 is the term "child" used. What is used is the term "issue". The term "child" is actually used elsewhere in Act 300, for instance in ss. 7 and 9 but certainly, not in s. 6, the relevant provision under consideration. Yet, the decisions of the Court of Appeal and the High Court turned on the definition of the term "child" as opposed to the term "issue", seeming to treat both terms as one and the same, that the definition of "issue" is to be found in the definition of "child", and that s. 6 provides for "child".

[65] With respect, this cannot be the correct interpretative exercise or construction to either of the terms. Such course in effect, renders the definition of "issue" otiose and redundant. Although it was held in *Ipoh*

A *Garden Sdn Bhd v. Ismail Mahyuddin Enterprise Sdn Bhd* [1975] 1 LNS 66; [1975] 2 MLJ 241, that associated words explain and limit each other, care must be taken to read the words, their use and context holistically:

> It is a fundamental rule in the construction of statutes that associated words (*noscitur a sociis*) explain and limit each other. The meaning of
B doubtful word or phrase in a statute may be ascertained by a consideration of the company in which it is found and the meaning of the words which are associated with it. The rule *noscitur a sociis* is frequently applied to ascertain the meaning of a word and consequently the intention of the legislature by reference to the context, and by considering whether the word in question and the surrounding words are, in fact,
C *ejusdem generis*, and referable to the same subject matter. Especially must it be remembered that the sense and meaning of the law can be collected only by comparing one part with another and by viewing all the parts together as one whole, and not one part only by itself.

[66] It is improper and wrong to ascribe the definition of "child" to the
D term "issue" without more, particularly when both terms are separately defined in s. 3; more so when the term "child" does not even appear in s. 6. Since the term "issue" is used in s. 6, we should strive to understand its meaning; and not so much the meaning of "child" used elsewhere in Act 300.

E **[67]** These are the definitions of the two terms as found in s. 3:

> 3. In this Act, unless the context otherwise requires:
>
> **"child"** means a legitimate child and where the deceased is permitted by his personal law a plurality of wives includes a child by any of such wives,
F but does not include an adopted child other than a child under the provisions of the Adoption Act 1952 [Act 257] or the Adoption Ordinance of the State of Sarawak [Swk. Cap. 91];
>
> **"issue"** includes the children and the descendants of deceased children;

[68] It is immediately apparent that both terms deploy different
G interpretation features. The term "issue" utilises the word "includes" while "child" is defined in more definitive language with the word "means". Generally, the presence of the word "includes" in the definition of a term suggests an enlarging or non-exhaustive definition as opposed to the use of the more definitive or comprehensive word "means", found in the definition
H of "child".

[69] Several decisions explain the significance of the word "includes" when used in the definition of a term, and how it differs from the word "means". See for instance *Rex v. Latip Haidin* [1935] 1 LNS 72; [1935] 1 MLJ 84; *PP v. Gan Boon Aun* [2017] 4 CLJ 41; [2017] 3 MLJ 12; [2013] 5 AMR 929;
I *Tenaga Nasional Bhd v. Majlis Daerah Segamat* [2022] 2 CLJ 497; [2022] 2 MLJ 119; [2022] 3 AMR 1; *Corporation Of Portsmouth v. Smith* 13 QBD 184; *Dilworth v. Commissioner Of Stamps* (1899) AC 99.

[70] In *PP v. Gan Boon Aun* [2017] 4 CLJ 41; [2017] 3 MLJ 12; [2013] 5 AMR 929, the Federal Court ruled that art. 160(2) is a non-exhaustive definition due to use of the word 'includes', whilst in *Tenaga Nasional Bhd v. Majlis Daerah Segamat* [2022] 2 CLJ 497; [2022] 2 MLJ 119; [2022] 3 AMR 1 the apex court observed that "the word "includes" will generally have an expansive, illustrative and or explanatory meaning, unless the statutory context in which it appears indicates that it must have an exhaustive meaning. The court needs to look at the statute in its full context to see what the statute in its entirety provided for".

[71] Similarly, Erett MR in *Corporation of Portsmouth v. Smith* (*supra*), 195 opined that the intention for using the word "includes" is that in construing the Act, "the word in addition to its ordinary meaning shall bear the meanings mentioned in the section". Further, the presence of such a word generally enlarges the meaning of the word or phrase occurring in the body of the statute; that "when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include", as per Lord Watson in *Dilworth v. Commissioner of Stamps* (*supra*) 105.

[72] In discerning the meaning of "issue" in Act 300, it is noticed that the definition in s. 3 actually does not explain what the term itself means. The definition instead provides for the scope or prescription of meanings that may fall within its group of meanings (*sui generis*), enlarging the primary meaning, in which case its ordinary or natural meaning must first be discerned.

[73] These are the definitions of the term "issue" in several dictionaries:

Oxford Dictionary of English

5 [mass noun] formal or Law children of one's own …

Oxford English Dictionary

1) n. a person's children or other lineal descendants such as grandchildren and great-grandchildren. It does not mean all heirs, but only the direct bloodline.

Anandan Krishnan (Anandan Krishnan, *Words, Phrases & Maxims – Legally & Judicially Defined,* Vol 91

In the law of descent, issue means descendants, lineal descendants; offspring; legitimate offspring. This word has a peculiar meaning, being often used in the sense of 'children' and legal or technical meaning, being used in the sense of 'descendant'. It is a term of flexible meaning (per Jesel JM in *Morgan v. Thomas* (1882) 9 QBD 645). The word 'issues' includes offspring of both sexes … An adopted son does not fall within the meaning of the term 'issue'… 'Issue' is a general name, including all, even to the remotest, descendants. The word 'issue' is a general term,

which, if not qualified or explained, may be construed to include grandchildren as well as children. A devise to 'issue' means, *prima facie*, legitimate issue, and an intention to include illegitimate must be deduced from the language itself, without resort to extrinsic evidence.

The Longman Dictionary of Law

1. Offspring, a person's issue comprises his children, grandchildren and other lineal descendants. See *Re Hammond* [1924] 2 Ch 276 (gift of personalty 'to A and his issue'); *Re Manley's WT* [1976] 1 All ER 673; *Re Drummond* [1988] 1 WLR 234.

Black's Law Dictionary [Eleventh Edition, Thomson Reuters 2019]

3. Wills & estates. Lineal descendants; offspring.

Jowitt's Dictionary of English Law

Issue (Lat. *Exitus*). Event, consequence, sending forth; the legitimate offspring of parents.

(1) The issue of a person consists of his children, grandchildren and all other lineal descendants. "Issue", however, is sometimes used by testators in the sense of "children" (*Re Warren* (1884) 26 Ch. D 208). Illegitimate descendants are presumed to be included in all instruments and legislation made since 1987: Family Law Reform Act 1987 s. 1 … Historically the word "issue" in a will was either a word of purchase or of limitation as would best answer to the intention of the testator, but the abolition of the rule in *Shelley*'s Case (1581) 1 Co Rep 93b (q.v.), by the Law of Property Act 1925 s. 13 means "issue" is now always construed as a word of purchase …

Stroud's Judicial Dictionary of Words and Phrases

Issue (OFFSPRING). This is a word of flexible meaning:

(a) Its legal meaning is "descendants" in *infinitum* (*Holland v. Fisher, Orl. Bridg*, 214; *Warman v. Seaman, Poll*. 117; *Davenport v. Hanbury* 3 Ves. 259; per Lord Watson, *Hickling v. Fair* [1899] AC 15)

(b) Its popular meaning is "children" (per Jessel MR, *Morgan v. Thomas* 9 QBD 643; and per James and Brett LJJ, *Ralph v. Carrick* 11 CH D 873); …

In its popular meaning it is a designation of persons; whilst in its technical import it is generally a word of limitation …

"issue" means primarily descendants in succession unless limited by context to "children" …

Osborn's Concise Law Dictionary [8th Edition, Swee & Maxwell]

Issue, (1) The issue of a person consists of his children, grandchildren, and all other lineal descendants. At common law, a gift "to A and his issue" conferred a life estate only because of the failure to use the appropriate word "heirs" …

[74] It is apparent from the above that the term "issue" in relation to the deceased suggests descendants by blood lineage, not dependent on the matter of legitimacy of the descendant. The word "issue" is used as a word of purchase, to describe how long an interest will last. Here, the right to inherit lasts so long as there is established some genetical or blood lineage connection between the person claiming succession in the distribution with the deceased. The definition of "issue" in s. 3 seeks to statutorily extend the generational lineage to beyond the immediate persons who may properly be counted as issue, to the offspring or grandchildren, even if the immediate parents of such grandchildren are themselves deceased.

[75] The presence of the word "children" in the definition of "issue" does not alter or affect the above conclusions. The intent in using the word "issue" as opposed to "children" in s. 6 is obviously to expand or enlarge the category of persons who may succeed or inherit, consonant with the purpose of Act 300. Otherwise, as mentioned earlier, the presence of the specific word "issue" would be bereft of meaning and purpose.

[76] In *Harrison v. Harrison* [1951] 2 All ER 346, Barnard J of the Probate, Divorce and Admiralty Division opined that "*prima facie* the term child or children in a statute means legitimate child or children, but a wider meaning may be given, where that meaning is more consonant with the object of the statute: see *Fulham Parish v. Woolwich Union* [1907] AC 255. Following this decision MacKinnon J in *Morris v. Britannic Assurance Co Ltd* [1931] 2 KB 125 held that the term "child" used in the Industrial Insurance Act 1923, included illegitimate children because the nature of the obligation as to which insurance was desired was the same whether the child was legitimate or illegitimate". In *Galloway v. Galloway (Ex parte)* [1955] All ER 429, the House of Lords was also of the view that although the word "children" in a statute *prima facie* meant legitimate children, that meaning was displaced if the context in which the word "children" appeared required it, to embrace a wider category than that of legitimate children.

[77] Similarly, in asking what is the object of Act 300, that it is all about distributing the estate of the intestate; that it does not deal with legitimacy of the child, offspring or issue of the deceased, the *prima facie* meaning of child is displaced by the presence of the word "issue". The added presence of the two separate defined terms of "child" and "issue" and deliberate use of the term "child" elsewhere in Act 300 and not in s. 6, the provision under consideration, supports and reinforces this conclusion.

[78] In the facts of the appeal, it is not in dispute that the second appellant is an issue of the deceased. Her birth certificate attests to that lineage. Consistent with the intent and purpose of Act 300, it cannot be denied that the second appellant falls within the meaning and scope of the term "issue" in which case she is indeed, entitled to succeed and inherit under s. 6. As an issue and descendent of her deceased father, her alleged lack of legitimacy does not deprive of her succession under s. 6.

[79] The respondent has urged for a stricter reading of ss. 3 and 6, citing *Minister Of Home Affairs & Anor v. Collins Macdonald Fisher & Anor* [1980] AC 319 where *Sydall v. Castings Ltd* [1966] 3 All ER 770 was referred to, that clear words are needed before the second appellant can inherit. Amendments to Act 300 are said to have not "improved the legal rights of illegitimate children", and Parliamentary debates of 5 August 1997 were cited in support. In contrast, examples of legislation using clear words to include illegitimate children were given. For instance, the Civil Defence Act 1951, Malay Regiment and the Federation Regiment (Retired Pay, Pensions, Gratuities and other Grants) Regulations 1952, Workmen's Compensation Act 1952, Civil Law Act 1956, Maintenance Ordinance 1959, Legitimacy Act 1961, Armed Forces Act 1972, Members of Parliament (Remuneration) Act 1980, Pensions Act 1980. Some of these legislations were discussed in *Pang Chuan Cheong & Ors v. Oh Kwong Foi & Ors* [2007] 8 MLJ 354; [2007] 5 AMR 107.

[80] In this regard, I refer to the comments of Lord Denning in *Sydall v. Castings Ltd* (*supra*) as to whether an illegitimate daughter was a descendant who could benefit under an insurance policy of her late father. Though rendered in a dissenting judgment and there has since been legislative changes in the English scene, the comments are nevertheless relevant to this appeal:

> We were pressed by counsel, however, to give the words an extraordinary meaning. "Relations", it is said, includes only legitimate relations; and "descendant" means only a legitimate descendant. For this purpose reliance is placed on a passage in *Jarman on Wills* (8th Edn.) p. 1783. If this contention be correct, it means that because Yvette is illegitimate, she is to be excluded from any benefit. She is on this view no "relation" to her father: nor is she "descended" from him. In the eye of the law she is the daughter of nobody. She is related to nobody. She is an outcast and is to be shut out from any part of her father's insurance benefit.
>
> I have no doubt that such an argument would have been acceptable in the nineteenth century. The judges in those days used to think that, if they allowed illegitimate children to take a benefit, they were encouraging immorality. They laid down narrow pedantic rules such as that stated by Lord Chelmsford in *Hill v. Crook* … In laying down such rules, they acted in accordance with the then contemporary morality. Even the Victorian fathers thought they were doing right when they turned their erring daughters out of the house. They visited the sins of the fathers on the children – with a vengeance. I think that we should throw over those harsh rules of the past. They are not rules of law. They are only guides to the construction of documents. They are quite out of date. We no longer penalise the illegitimate child. We should replace those old rules by a more rational approach. If they are wide enough to include an illegitimate child, we should so interpret them …

[81] The rational interpretation and meaning of 'issue' as explained above is clear from the terms of s. 6 and, it accords with the purpose and intent of Act 300. Such a reading complies with the equality guarantees in art. 8 of the Federal Constitution as there is no logical or rational differentiation to discriminate between all offspring of the deceased. Furthermore, such a reading undeniably promotes the welfare of the second appellant. As expounded in the *les celebre* decision of *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145; [2018] 1 MLJ 545; [2018] 2 AMR 313, a literal construction which would give rise to consequences which the Legislature could not possibly have intended should be avoided. Instead, a "purpose reading of art. 12(4) that promotes the welfare of the child and is consistent with good sense would require the consent of both parents (if both are living) for the conversion of a minor child".

[82] I must add that to succumb to the respondent's arguments would be to give Act 300, in particular its s. 6, an interpretation and construct which will strain the intent and meaning of the provisions including that of the definition of "child" in s. 3. More so when, as alluded to earlier, s. 5 has clearly provided that "for the purpose of distribution under this Act, there shall be no distinction between those … actually born in the lifetime of the deceased or who at the time of his death, were only conceived in the womb but who were born alive after the deceased's passing". There cannot be any more emphatic or clearer language on the intent of Act 300.

[83] On this reason alone, the appeal must be allowed and the decisions of the courts below set aside.

(ii) The Customary Marriage

[84] For completeness, I shall deal with the matter of the validity of the marriage between the deceased and the mother of the second appellant, Lu YanLiu. This was a Chinese customary marriage. From the grounds of decision of the High Court, there is no affirmative finding that there was no such marriage. The High Court was in fact more concerned with the issue of registration of a customary marriage; that post 1 March 1982, all customary marriages must be registered. Otherwise, such marriages are invalid. Section 4 of the Law Reform (Marriage and Divorce) Act 1976 (Act 164) provides that any marriage solemnised under any law, religion, custom or usage after Act 164 came into force must be registered to be valid – see paras. 37 and 38 of the grounds of decision at the High Court. This was affirmed on appeal – see para. 69 of the grounds of decision at the Court of Appeal.

[85] At para. 37, the learned High Court Judge acknowledged that the "traditional wedding and dinner held by the said deceased and DW2 at Lan Hwa Hotel/Restaurant in Klang was at the end of 2002 and therefore for the

marriage to be valid it has to be registered which the deceased and DW2 in the present case failed to do". Consequently, the High Court proceeded to hold at para. 38 that "the deceased and DW2 was (*sic*) never legally married at any material time under LRA".

[86] Two observations on the existence and validity of a customary marriage.

[87] First, Act 164 came into force only on 1 March 1982, the appointed date, almost six years after it was passed by Parliament – see s. 1. As explained at the outset of this judgment and also discussed by the Court of Appeal in *Tan Siew Sen & Ors v. Nick Abu Dusuki Hj Abu Hassan & Anor* [2016] 6 CLJ 18; [2016] 4 MLJ 602; [2016] 3 AMR 787, Act 164 applies to all non-Muslims in Malaysia and to all persons domiciled in Malaysia but are resident outside Malaysia, that it seeks to provide for monogamous marriages and the solemnisation and registration of such marriages. Act 164 now forms the personal law of such persons. Consequently, while the deceased may belong, follow or practice some religion, custom or usage, Act 164 is the law which will apply to him and his person.

[88] Next, from the provisions of Act 164 there are two material aspects to a marriage process: the solemnisation and the registration. Of the two, it is the solemnisation that "maketh" the marriage, or forms the formal part of the marriage where vows or oaths are made and exchanged, witnessed and performed by properly authorised persons. This is evident from the terms of ss. 5(4), 6, 22 to 26, and 34. Under s. 6, marriages which do not abide by these requirements "shall be void"; and as provided in s. 34, registration or lack of registration does not affect the validity or invalidity of a marriage:

> **Disability to contract marriages otherwise than under this Act**
>
> 5(4) After the appointed date, no marriage under any law, religion, custom or usage may be solemnised except as provided in Part III.
>
> **Avoidance of marriage by subsisting prior marriage**
>
> 6(1) Every marriage contracted in contravention of section 5 shall be void.
>
> **Solemnisation of marriages**
>
> 22(1) Every marriage under this Act shall be solemnised:
>
> (a) in the office of a Registrar with open doors within the hours of six in the morning and seven in the evening;
>
> (b) in such place other than in the office of a Registrar at such time as may be authorised by a valid licence issued under subsection 21(3); or
>
> (c) in a church or temple or at any place of marriage in accordance with section 24 at any such time as may be permitted by the religion, custom or usage which the parties to the marriage or either of them profess or practise.

(2) A valid marriage may be solemnised under paragraph (1)(a) or (b) by a Registrar if a certificate for the marriage issued by the Registrar or Registrars concerned or a licence authorising the marriage is delivered to him.

(3) A valid marriage may be solemnised under paragraph (1)(c) by an Assistant Registrar if he is satisfied by statutory declaration that:

(a) either:

(i) each of the parties is twenty-one years of age or over, or, if not, is a widower or widow, as the case may be, or

(ii) if either party is a minor who has not been previously married and the female party not under the age of sixteen years that the consent of the appropriate person mentioned in section 12 has been given in writing, or has been dispensed with, or has been given by a court in accordance with section 12;

(b) there is no lawful impediment to the marriage;

(c) neither of the parties to the intended marriage is married under any law, religion, custom or usage to any person other than the person with whom such marriage is proposed to be contracted; and

(d) in so far as the intended marriage is a Christian marriage and is to be solemnised in accordance with the rites, ceremonies or usages of a Christian religious denomination, the provisions of the canons of such religious denomination relating to the publication of banns or the giving notice of the intended marriage have been complied with or lawfully dispensed with in accordance with such canons.

(4) Every marriage purported to be solemnised in Malaysia shall be void unless a certificate for marriage or a licence has been issued by the Registrar or Chief Minister or a statutory declaration under subsection (3) has been delivered to the Registrar or Assistant Registrar, as the case may be.

(5) Every marriage shall be solemnised in the presence of at least two credible witnesses besides the Registrar.

(6) No marriage shall be solemnised unless the Registrar is satisfied that both the parties to the marriage freely consent to the marriage.

Solemnisation of a civil marriage performed in office of a Registrar or elsewhere

23. The Registrar acting under paragraph 22(1)(a) or (b) shall, after delivery to him of a certificate for the marriage issued by the Registrar or Registrars concerned or a licence authorising the marriage, address the parties in the following words, either directly or through an interpreter:

Do I understand that you A.B. and you C.D. are here of your own free will for the purpose of becoming man and wife?.

Upon their answering in the affirmative he shall proceed thus:

> Take notice then that, by this solemnisation of your marriage before these witnesses here present according to law, you consent to be legally married for life to each other, and that this marriage cannot be dissolved during your lifetime except by a valid judgment of the court and if either of you shall, during the lifetime of the other, contract another marriage, howsoever and wheresoever solemnised, while this marriage subsists, you will thereby be committing an offence against the law.

Next, the Registrar shall enquire of the parties, directly or through an interpreter, whether they know of any lawful impediment why they should not be joined together in matrimony. Upon their answering in the negative he shall enquire, directly or through an interpreter, of each of the parties whether he or she will take her or him to be his or her lawful wedded wife or husband. Upon their answering in the affirmative, the Registrar, the parties and the witnesses shall comply with section 25.

Solemnisation of a marriage through religious ceremony, custom or usage

24(1) Where any clergyman or minister or priest of any church or temple is appointed by the Minister to act as Assistant Registrar of Marriages for any marriage district, such clergyman or minister or priest may after delivery to him of a statutory declaration under subsection 22(3) solemnise any marriage, if the parties to the marriage or either of them profess the religion to which the church or temple belong, in accordance with the rites and ceremonies of that religion.

(2) Where any person is appointed by the Minister to act as Assistant Registrar of Marriages for any marriage district such person may after delivery to him a statutory declaration under subsection 22(3) solemnise any marriage in accordance with the custom or usage which the parties to the marriage or either of them practise.

(3) An Assistant Registrar solemnising a marriage under this section shall in some part of the ceremony remind the parties that either of them shall be incapable during the continuance of the marriage of contracting a valid marriage with any other person and if either of them shall marry during the continuance of the marriage he or she shall commit an offence.

(4) In this section:

> "priest of a temple" includes any member of a committee of management or governing body of that temple and any committee member of any religious association;
>
> "priest of a church" includes any officer or elder of the church.

Entry in marriage register

25(1) Immediately after the solemnisation under section 23 or 24 is performed the Registrar shall enter the prescribed particulars in the marriage register.

(2) Such entry shall be attested by the parties to the marriage and by two witnesses other than the Registrar present at the solemnisation of the marriage.

(3) Such entry shall then be signed by the Registrar solemnising the marriage.

Solemnisation of marriages in Malaysian Embassies, *etc.*, abroad

26(1) A marriage may be solemnised by the Registrar appointed under subsection 28(4) at the Malaysian Embassy, High Commission or Consulate in any country which has not notified the Government of Malaysia of its objection to solemnisation of marriages at such Malaysian Embassy, High Commission or Consulate:

Provided that the Registrar shall be satisfied:

(a) that one or both of the parties to the marriage is a citizen of Malaysia;

(b) that each party has the capacity to marry according to this Act;

(c) that, where either party is not domiciled in Malaysia, the proposed marriage, if solemnised, will be regarded as valid in the country where such party is domiciled; and

(d) that notice of the proposed marriage has been given at least twenty one days and not more than three months previously, which notice has been published both at the office of the Registrar in the Embassy, High Commission or Consulate where the marriage is to be solemnised and at the Registry of the marriage district in Malaysia where each party to the marriage was last ordinarily resident and no caveat or notice of objection has been received.

(2) The procedure for solemnisation and registration of marriages at a Malaysian Embassy, High Commission or Consulate shall be similar in all respects to that which applies to marriages solemnised and registered in Malaysia under this Act as if the Registrar appointed for a foreign country were a Registrar in Malaysia.

(3) A marriage solemnised under this section shall, for the purposes of this Act, be deemed to be a marriage solemnised in Malaysia, and subsection 7(2) shall apply *mutatis mutandis* in relation to any offence under this Act, in respect of such marriage.

Legal effect of registration

34. Nothing in this Act or the rules made thereunder shall be construed to render valid or invalid any marriage which otherwise is invalid or valid merely by reason of its having been or not having been registered.

[89] While s. 5(3) permits a person, who is unmarried and who after the appointed date marries under any law, religion, custom or usage, that person cannot or is incapable, during the continuance of this earlier marriage,

A contract a valid marriage with another person under any law, religion, custom or usage. That first marriage however, must nevertheless be solemnised in accordance with the provisions in Part III – see s. 5(4) and as just mentioned, a failure to comply with s. 5, including s. 5(4) renders the marriage, void under s. 6.

B **[90]** The importance and significance of the solemnisation process is borne out by the detailed requirements of the contracting parties, the registrar, clergyman, minister or priest who is solemnising the marriage and what particular words such persons have to use to address the parties when performing the solemnisation, and the need for a statutory declaration C affirming the matters set out in s. 22(3) – see ss. 22 to 24 as set out above.

[91] The solemnisation of the marriage may be conducted at the civil registry or office by the Registrar of Marriages or "elsewhere"; the latter being "such place other than in the office of a Registrar at such time as may be authorised by a valid licence issued under sub-s. 21(3); or "in a church D or temple or at any place of marriage in accordance with s. 24 at any such time as may be permitted by the religion, custom or usage which the parties to the marriage or either of them profess or practise" (see s. 22(1) of Act 164). Regardless the location of the solemnisation, the marriage must be immediately registered – see s. 25(1). Registration records the fact of the E marriage brought into existence through the solemnisation. Hence, the terms of s. 34.

[92] Consequently, although s. 5(3) of Act 164 permits the deceased and Lu YanLiu to marry under any law, religion, custom or usage, s. 5(4) nevertheless requires such marriage to be solemnised in the manner as F provided in Part III, namely ss. 22 to 26 of Act 164. These requirements under Act 164, with effect from 1 March 1982, the appointed date, now forms part of the personal law of the deceased. Although the position in Singapore under the Women's Charter 1961 differs slightly from the provisions of Act 164, the observations of Choor Singh J in *Re Estate Of Liu* G *Sinn Min, Deceased* [1974-1976] SLR(R) 143 at p. 34 aptly sums up my thoughts on this aspect of a valid customary marriage, post appointed date:

> … Whatever may have been the position in Singapore before the coming into force of the Women's Charter on 15 September 1961 it is clear that after this date, persons of the Chinese race, indeed persons of all races H with the exception of those professing the Muslim faith, are no longer governed by their personal law. All questions relating to their marital status and the legal consequences which flow from that status are now governed by the Women's Charter. It is no longer possible for Chinese or Hindus to contract in Singapore polygamous marriages which they could under their personal law …

I

This decision was cited with approval in *Soniya Chataram Aswani v. Haresh Jaikishin Buxani* [1995] SGHC 169 by G P Selvam J, where His Lordship at para. 10 said:

> That is a succinct statement of the true legal position. It is, of course, permitted to have a customary marriage ceremony after and in addition to observing the requirements of the Act for a valid marriage but such a ceremony could not take place before solemnisation of marriage as prescribed by the Act …

I agree and adopt the same.

[93] There is no evidence that the marriage between the deceased and Lu YanLiu was solemnised in accordance with Part III. In fact, this aspect was not addressed. What instead was led in evidence was a conduct of a customary marriage involving a traditional dinner with family and friends. No photographs were produced to support this. The deceased and Lu YanLiu then proceeded to live together for around three years during which time the second appellant was born and the second appellant was accepted into the deceased's family as a grandchild. Testimonies to this effect were given by Lu YanLiu and the deceased's parents.

[94] Insofar as the existence of a customary marriage is concerned, it is not necessary that photographs or even a traditional tea ceremony is required to prove or establish its existence. A Chinese customary marriage does not only involve a dinner nor must there even be one to begin with. Other traditions may be led to establish its existence. In *Cheang Thye Pin v. Tan Ah Loy* [1920] AC 369, and later in *Khoo Hooi Leng v. Khoo Hean Kwee* [1926] AC 529, the Privy Council held that no particular form of ceremony was required to recognise a Chinese customary marriage; this is still good law which however, must be read with the changes introduced by Act 164.

[95] As pointed out in the report of the *Royal Commission on non-Muslim Marriages and Divorce*, "the only essential legal requirement of a Chinese customary marriage is that the marriage must be consensual. The ingredients of a ceremony, formal contract, repute of marriage and so on are treated as being evidential only and not essential". Given that Act 164 still allows for contracting and conducting of marriages according to law, religion, custom or usage, it can only be concluded that such marriages may still take place, especially in cosmopolitan, multi-religious and multiracial Malaysia. And, from all the evidence adduced, it may be satisfactorily deduced that there was indeed, a Chinese customary marriage between the deceased and Lu YanLiu.

[96] Such a customary marriage must nevertheless be solemnised in the manner provided in Part III in order to be valid. That would be the clear intention of ss. 5(3) and (4), that the personal law on marriage here has been tempered by statute. Aside from the fact that the customary marriage

A between the deceased and Lu YanLiu was never registered, there was no evidence on whether the solemnisation process in the statutory terms as explained was actually complied with. Pursuant to s. 75(2) read with s. 75(7) of Act 164, such a marriage which is in contravention of s. 6 is a void marriage. I must add that the issue of plurality of wives under Act 300 thus
B becomes irrelevant. Had the Chinese customary marriage between the deceased and Lu YanLiu been in accordance with Act 164, the validity of the subsequent marriage between the deceased and the respondent would then become questionable.

[97] That, however, is in respect of the validity of the marriage between
C the deceased and Lu YanLiu. As far as the second appellant is concerned, and this is the real focus of the appeal and also the claims at the High Court, s. 75(2) provides that the child of a void marriage shall be treated as the legitimate child of his parent, if, at the time of the solemnisation of the marriage, both or either of the parties reasonably believed that the marriage
D was valid. Section 75(2) applies even if there was no petition to declare the Chinese customary marriage a nullity as s. 75(7) defines "void marriage" to mean a marriage declared to be void under ss. 6, 10, 11, sub-s. 22(4) or s. 72. These circumstances for declaring a marriage void are in effect wider than the grounds on which a marriage may be declared void under s. 69. Section 69 does not include a ground to avoid a marriage by reason of lack
E of solemnisation, a requirement under s. 5(4) and which would render the marriage void under s. 6.

[98] Evidence was led to the effect that Lu YanLiu had this reasonable belief. As opined by Shanker J (as His Lordship then was) in *T v. O* [1994]
F 4 CLJ 593; [1993] 1 MLJ 168; [1994] 3 AMR 2402, reasonable belief "is a question of fact. The emphasis is on the word 'reasonable'. This imports an element of objectivity into what is otherwise a highly subjective matter. Whether a person reasonably believed something must therefore depend on the facts of the case". The testimonies of Lu YanLiu and the parents of the
G deceased as well as the conduct of the parties attests to the existence of such belief.

[99] It can be appreciated why s. 75(2) aims to de-characterise the status of illegitimacy which would otherwise visit on the second appellant. Although this provision was not addressed in the courts below, this is a point
H of law, and an important one at that, which must be addressed at any time, in the name of and for the sake of doing justice.

[100] For this added reason, the second appellant is actually a legitimate child entitled to inherit under her late father's estate.

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[101] As for the related questions posed for the determination of this court, it is apparent that the focus of these questions should have been on the term "issue" and not the term "child". Even the additional question of "Whether the term 'child' in s. 6(1)(g) of the Distribution Act 1958 applies to all the natural born children of a deceased for succession purpose?" suffers the same fate. Although Chinese customary marriages may still be contracted, such marriages must comply with Act 164 in respect of solemnisation and registration. This court must thus decline to answer these related questions.

(iii) Removal Of Joint Administrators

[102] The first appellant was removed as joint administrator on the ground that he had misled the respondent on the legal position of the second appellant. This left the respondent as co-administrator with Amanah Raya Berhad appointed in place of the first appellant. Consequential orders to the effect of displacing the beneficiaries of the deceased's estate, namely his parents, and the second appellant, were made.

[103] Section 34 of the Probate and Administration Act 1959 under which the court was moved for the removal of the first appellant reads as follows:

> Any probate or letters of administration may be revoked for sufficient cause.

[104] With the reasons as explained above, there was no basis or cause for the removal of the first appellant.

[105] In any event, in the consideration of whether there was proof of sufficient cause, the welfare, interests and benefit of all the beneficiaries of the estate of the deceased must always be given proper regard. The sufficiency of cause for any removal of an appointment by the court must be taken carefully, weighing the grounds of complaint against the welfare and interests of all beneficiaries. This was explained in *Letterstedt v. Broers* [1884] 9 AC 371 and also in *Damayanti Kantilal Doshi & Ors v. Jigarlal Kantilal Doshi & Ors* [1998] 4 CLJ 81; [1998] 4 MLJ 268.

[106] There was no such consideration, with the High Court taking the view that since the first appellant had misled the respondent on the second appellant's entitlement, he was conflicted. The welfare of the other beneficiaries was not weighed especially when the High Court made the consequential orders for a sale of the family home. This is clearly erroneous.

[107] The fourth question posed must thus be answered in the negative.

[108] In the upshot, the order for the removal of the first appellant is in error and must be set aside.

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Conclusion

[109] For all the reasons explained above, the appeal is allowed with costs and the decisions of the High Court and the Court of Appeal are set aside. For clarity, the decision of the High Court in respect of the counterclaim stands dismissed as leave to refer questions in respect of the counterclaim was disallowed.

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